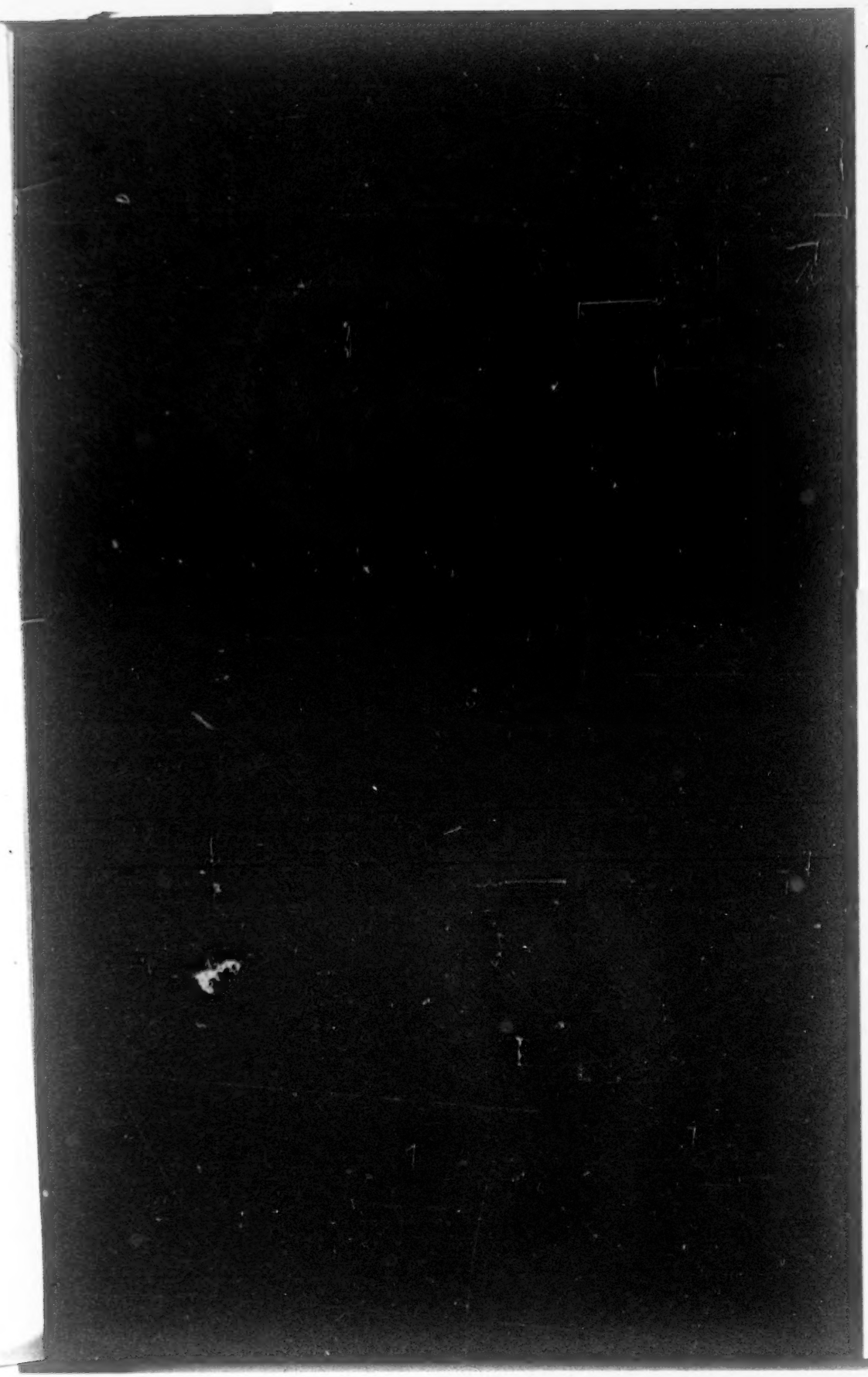

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 566

GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 416–441) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 455–465) is reported in 91 F. (2d) 898.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 23, 1937 (R. 466). The petition for a writ of certiorari was filed November 9,

1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the petitioner's communications to representatives of the Kerensky Government of Russia constituted an unequivocal repudiation of petitioner's liability for the bank deposit in question.

2. Whether those communications were in any way notice to and binding on the Soviet Government.

3. Whether a state statute of limitations operates to bar the claim of a foreign sovereign.

4. Whether a state statute of limitations can operate to defeat the consummation of the international compact between the United States and the Soviet Government which contains the Litvinov Assignment.

STATUTES AND ASSIGNMENT INVOLVED

The statutes involved are found on pages 11 to 13 of the petition. The Litvinov Assignment is printed in the Appendix, *infra*, p. 18.

STATEMENT

On November 16, 1933, by an exchange of letters between the President of the United States and

Maxim Litvinov, Commissar for Foreign Affairs of the U. S. S. R., the Soviet Government assigned to the United States all of its claims against American nationals. One of these claims is the one now involved, which represents the balance of a deposit account opened with the petitioner in 1916 by the Imperial Russian Government. The balance of this foreign government account on December 12, 1917, after the Soviet Government succeeded the prior government of Russia on November 7, 1917, was and remains $4,976,722.78, with interest (R. 5).

One of the first acts of the Soviet Government was the dismissal of Boris Bakhmeteff, who had been the Ambassador of the prior Provisional or Kerensky Government of Russia to the United States, and Serge Ughet, Financial Attaché of the former Government of Russia, on November 26, 1917, upon their failure to acknowledge allegiance to the Soviet Government (R. 301–303, 93, 354). The Soviet Government did not recognize either Bakhmeteff Ughet as its representatives (R. 353).

The United States brought this action on September 21, 1934, after diplomatic recognition, to recover from the petitioner the aforesaid balance of the deposit account, with interest. The petitioner filed, in lieu of an answer to the Government's complaint, a motion pursuant to Rule 107 of the New York Rules of Civil Practice, supported by

affidavits of officials of the bank and others, claiming that the New York six-year statute of limitations had barred the claim prior to the institution of the action. The affidavits in support of the motion assert that the petitioner on several occasions prior to 1922 had declined to surrender the account to the aforesaid diplomatic officials of the Provisional Government of Russia. These affidavits also assert that the Russian Government was indebted to the petitioner in the sum of $9,000,000. There is no support in the record for the statement of such a liability, beyond self-serving entries made on the books of the petitioner. The Russian Government at no time owed to the petitioner any such amount as $9,000,000.[1] That fact will be fully established on the trial of this action.

The affidavits submitted by the Government in opposition to the petitioner's affidavits state facts which, it is submitted, establish that the petitioner made no unequivocal refusal to pay the deposit account.[2]

The District Court, in granting the petitioner's motion, concluded that prior to the diplomatic rec-

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[1] The figure of $9,000,000 was based upon an alleged dollar value of rubles held to the credit of petitioner by banks in Russia. At the trial respondent will prove that the arbitrary value adopted by petitioner was, in fact, greatly in excess of the true value of rubles measured in dollars.

[2] Petitioner (p. 4) does not contend that the statute of limitations began to run unless there was an unqualified refusal to pay.

ognition of the Soviet Government and the assignment in question a repudiation of the debt had been communicated to Bakhmeteff and Ughet, that such notice bound the Soviet Government, and that the New York statute of limitations was a bar to this action (R. 416–441).

The petitioner's references to the "findings of fact" and to the "facts founds" by the District Court (pp. 5, 6) are misleading. The District Court did not purport to make a final determination of the facts of an unequivocal repudiation of the debt. Its view of the facts based on the affidavits was expressed only in its oral opinion (R. 416–441). There were no formal findings of fact or trial of the issue. The District Court recognized that its view of the facts would not bind the appellate courts.[2]

The Circuit Court of Appeals, in an opinion by Circuit Judge Swan, held that the local statute did not run against a foreign sovereign and that no state statute ran against a foreign sovereign in view of the complete power over international affairs vested in the national government, citing *United*

[2] This is made clear in the following language of the District Court's opinion (R. 433):

"* * * As a matter of fact, I think about all that my decision of this case amounts to is that it determines who shall print the appeal papers.

"Moreover, there is another feature which is worth noting. On the fact side this case carries with it no presumption of the correctness of my findings, because the evidence is in the shape of affidavits or depositions. Each appellate court in passing on the papers, therefore, will be in identically the same position as the trial court."

States v. *Belmont,* 301 U. S. 324 (R. 455–458). Circuit Judge Manton wrote a separate concurring opinion (R. 459–465) and Judge Chase dissented without opinion. The court did not consider the other questions decided by the District Court.

ARGUMENT

1. *The order of the Circuit Court of Appeals is not final.* The order of the court below (R. 466), reversing the order of the District Court which had dismissed the complaint and thus reinstating the complaint and requiring the case to be remanded for further proceedings, does not dispose of this case and, therefore, is interlocutory. *Benjamin* v. *Dubois,* 118 U. S. 46, 48; *Bostwick* v. *Brinkerhoff,* 106 U. S. 3. That fact alone is "sufficient ground for the denial of the application" for certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U. S. 251, 258. The general rule that interlocutory orders will not be reviewed avoids appellate consideration of orders which in the progress of the action may "become quite unimportant by reason of the final result, or of intervening matters" (*American Construction Co.* v. *Jacksonville Railway,* 148 U. S. 372, 384), and, therefore, petitions to review such orders have been denied in the absence of special circumstances. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co., supra; Fields* v. *United States,* 205 U. S. 292, 296; *American Construction Co.* v. *Jackson-*

ville Railway, 148 U. S. 372, 378; *In re Woods*, 143 U. S. 202, 205–206.[4]

The final disposition of this case after answer and trial may be on a ground which will not require consideration of the question decided by the interlocutory decision of the court below.[5]

2. *The fact, and effect, of the alleged unequivocal refusal to pay the debt has not been conclusively determined.* a. The District Court determined on the affidavits on the motion to dismiss the complaint that an unequivocal refusal had been made and that thereupon the period of limitations prescribed by

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[4] The exceptional jurisdiction to review such orders is "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258. Compare *Prudence Co.* v. *Fidelity & Deposit Co. of Maryland*, 297 U. S. 198; *Stringfellow* v. *Atlantic Coast Line R. Co.*, 290 U. S. 322; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 121; *Forsyth* v. *Hammond*, 166 U. S. 506; *The Three Friends*, 166 U. S. 1, 49; *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587.

[5] The petition (pp. 8–9) refers to the fact that certiorari was granted in *United States* v. *Belmont*, 299 U. S. 537, and *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 558, and suggests that the question here involved should be settled now for guidance of the lower courts in other cases involving the Litvinov Assignment. In both of the cases referred to this Court reviewed final orders dismissing the complaints. In the *Belmont* case the erroneous decision of the lower court, if not reversed, would have barred many other pending claims by the United States. But the question involved here does not even dispose of this case in which the petitioner admits (p. 9) that there are other issues.

the New York statute of limitations began to run.[6] The respondent contended in the Circuit Court of Appeals that the New York statute did not apply, and that even if it did, the affidavits did not disclose an unequivocal refusal and, at least, presented an issue of fact on the question of refusal which should be determined on trial. The Circuit Court of Appeals determined that the statute of limitations did not apply and so did not consider the other questions.

If this Court grants the writ and reverses the court below it will be necessary, in doing so, either to determine the fact of an unequivocal repudiation of the debt on the affidavits or to remand the case for determination of that question on the trial. It is submitted that on such a record the application of the statute of limitations in this situation should not be determined and that for this reason also the petition should be denied.

b. Moreover, even if the Circuit Court of Appeals were reversed, the question of application of limitations here could not be decided finally until

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[6] The petitioner contends (p. 9) that "The question of limitations is fully presented by this record * * *." The respondent emphatically disagrees and believes that the present record is wholly inadequate and deficient as a final and complete presentation of all of the facts of repudiation of the debt because it consists entirely of affidavits based on information largely in the petitioner's control and does not give the respondent the opportunity to bring out all the facts by a trial and examination and cross-examination of witnesses, including the parties who made the affidavits in behalf of the petitioner.

the determination of the correctness of the District Court's rulings that communications to Boris Bakmeteff and Serge Ughet after 1917 commenced the period of limitations against the Soviet Government. The Circuit Court of Appeals did not consider this point. The respondent contended and it seems clear that the Soviet Government became owner of this government bank deposit immediately upon the commencement of its existence as the government in Russia on November 7, 1917, under the doctrine of retroactivity of diplomatic recognition (*United States* v. *Belmont*, 301 U. S. 324, 328–330). Therefore, the Soviet Government was not bound by later communications to Bakmeteff and Ughet, representatives of the preceding Kerensky Government, who never represented the Soviet Government (R. 353). It is conceded that no repudiation was communicated to the Soviet Government.

3. *The statute of limitations does not run against a foreign sovereign.* We submit that the decision of the court below is correct. The basis of the rule that no statute of limitations binds the domestic or local sovereign unless it expressly so provides is the public policy that public rights or interests shall not be lost or curtailed by the failure of public servants to assert them promptly. *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427, 437; *United States* v. *Nashville, etc., R. Co.*, 118 U. S. 120, 125; *United States* v. *Thompson*, 98 U. S. 486, 489; *United States* v. *Hoar*, 2 Mason 311, 313–

314, Fed. Cas. No. 15373. For the several following reasons, that policy is equally applicable to foreign sovereigns:

a. That policy is "applicable to all governments alike," *United States* v. *Nashville, etc., R. Co.*, 118 U. S. 120, 125, and it seems clear that the policy in purpose is equally applicable to public rights, whether asserted in foreign or in domestic courts.

b. Furthermore, for the courts of the domestic sovereign to deprive a foreign sovereign of this immunity, which has been called a "sovereign right or privilege" (*Dupont De Nemours & Co.* v. *Davis*, 264 U. S. 456, 462), and which is based on a public policy which in purpose applies equally to the domestic and foreign sovereign, would constitute a failure to accord to the foreign sovereign complete attributes of sovereignty, and would to that extent subject the foreign sovereign to local law. This result has always been prohibited. *United States* v. *Diekelman*, 92 U. S. 520, 524; *The Exchange*, 7 Cranch 116, 136; *French Republic and Board of Supervisors* v. *Jefferson County*, 200 Ky. 18, 252 S. W. 124, 125.

c. The foreign sovereign's immunity from a local statute of limitations is required by the public international policy of treating foreign and domestic sovereigns alike, which policy similarly results in other immunities to foreign sovereigns seeking remedies in the courts, such as immunity from taxation (*French Republic and Board of Supervisors* v. *Jefferson County, supra*), immu-

nity from interpleader or affirmative judgment without consent (*Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341 (C. C. A. 2d), and immunity from execution of judgment in an action in which a sovereign has consented to suit (*Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 F. (2d) 705 (C. C. A. 2d).

d. The several States have no power to pass statutes of limitations binding the United States, for the reasons, stated by this Court, that they cannot make the United States suable in the state courts (*United States* v. *Thompson*, 98 U. S. 486, 490) and have no jurisdiction over the United States (*Gibson* v. *Chouteau*, 13 Wall. 92, 99). For the same reasons the several States, which are not sovereign in the field of foreign relations, cannot bind foreign sovereigns by statutes of limitations.

4. *There is no conflict of decisions.* The petitioner asserts (p. 7) that the decision below is "contrary to the rule of decision indicated by this Court in *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U. S. 427." The opinion in that case, however, at page 437, expressly stated that application of the statute of limitations to a foreign sovereign "is a question which does not necessarily arise in this case, and as to which we are not called upon to express an opinion."

The petitioner asserts that the decision below conflicts with local New York decisions (p. 10) and that the court below disregarded cases concluding

that a foreign sovereign is barred by the statute of limitations (p. 17), citing *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. 533, 535–536 (C. C. Ky.); *Western Lunatic Asylum* v. *Miller*, 29 W. Va. 326, 1 S. E. 740; *United States* v. *Brown*, 247 N. Y. 211, 218; *Royal Italian Government* v. *International Committee of Y. M. C. A.*, 273 N. Y. 468.

In the *Buckner* case the court stated that the two-year limitation on suits against collectors to recover federal taxes applied to a municipality because the remedy was indirectly against the United States and the statute provided the conditions on which the United States consented to suit, and therefore must be complied with in every respect by everyone. In the *Miller* case the court stated that the plaintiff, a public corporation of Virginia, was subject to the same limitations as a natural person and then stated that, conceding the plaintiff and the Commonwealth of Virginia were one, the local limitation barred Virginia. The court remarked, however, that the local statute also barred the local sovereign. In neither of these cases was there involved the wholly different question decided by the court below of the application of a local statute of limitations, which does not bind the United States, to a claim by the United States obtained by assignment from a foreign sovereign.

In the *Royal Italian Government* case the records reveal that the question of whether the foreign

sovereign was exempt from the local statute of limitations was presented for the first time on a motion for reargument in the Appellate Division of the Supreme Court of New York after its decision and was not before that court when it made the judgment affirmed by the Court of Appeals without opinion. In the *Brown* case the court held that the United States was not bound by the local statute of limitations, and remarked at page 218: "Nor is it a case where another State or a foreign government comes to us for relief." That language is not a ruling in favor of the petitioner and, in so far as it places another State and a foreign government in the same category, is not in accord with the principles expressed in *United States* v. *Belmont*, *supra*.

The petitioner (pp. 7, 22–25) also asserts that the decision of the court below "is contrary to judicial practice throughout the world" and relies largely upon the argument that since in many countries, by statute, limitations run against the *local* sovereign, they should be considered to run against a foreign sovereign. It does not appear that any statute or instance referred to by the petitioner involved a limitation, binding upon a superior sovereign or a foreign sovereign, prescribed by a local government having no international status such as New York in the present case. The petitioner's assertion does not bear upon the correctness of the decision of the court below, which holds that where, as here, the local sovereign is exempt from

any statute of limitations of a local government, foreign sovereigns enjoy under international comity the same sovereign equality, and that in any event the local statute cannot bar a claim by the United States under the Litvinov Assignment. *United States* v. *Belmont, supra.*

Furthermore, it is by no means clear that the mere inclusion of the local sovereign in general statutes of limitations in some instances in some civil law jurisdictions is meant to bar the assertion of all public rights after the limitation has expired. The difficulty of accurate determination of proper judicial exceptions to general statutory provisions is one reason for the rule that such foreign law is not judicially noticed but must be proved as a fact with the aid of experts versed in the foreign law.

If reference is to be made to any foreign law it should be made to Soviet law alone because if exemption of a foreign sovereign from the local statute of limitations depends in any degree on the exemption granted to the United States abroad it should depend on the exemption granted by the law of the foreign sovereign involved here. The petitioner (p. 23) asserts that Soviet courts have held that the Soviet Government is barred by the general statute of limitations and cites Civil Code, Art. 44, and *Administration of Siberian Railroads* v. *Representative of the Supreme Council of People's Economy.* Art. 44 does not in terms refer to the Soviet State or Government but provides

limitations for private parties and between state institutions, enterprises, collectives, communal and cooperative organizations. In the *Siberian Railroads* case the court decided no more than that a special and specific one-year statute of limitations prescribed by Sections 101 and 102 of the Railroad Code, with respect to claims by railroads, applied. There was no question of the application of the general statute, Article 44 of the Civil Code.

Indeed the Soviet law appears to be well settled that the statute of limitations does not apply to suits by the Soviet State or any of its agencies to enforce public rights or to recover state property. *Explanation of Plenum of Supreme Court of R. S. F. S. R., Protocol No. 10, June 29,* 1925; *Harkomprod* v. *Mosselprom,* April 17, 1923, 2 Dec. V. A. K. (Supreme Arbitration Council) No. 98; *Saratov Gubkomotdel* v. *Riazan-Ural R. R.,* May 3, 1923, 3 Dec. V. A. K. No. 106.

Moreover, the extent of the immunity extended to a foreign sovereign is not limited by the extent of the sovereign immunity extended to the United States by the courts of the foreign sovereign. *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562.

In other common law jurisdictions as well as in the United States the local sovereign is exempt from the statute of limitations, *Lambert* v. *Taylor,* 4 B. & C. 138; *Brummel* v. *McPherson,* 5 Russ. 263, and the general sovereign immunity of the local sovereign from suit is extended to foreign sovereigns, *The Parlement Belge,* L. R. 5 P. D. 197,

210. It is submitted, therefore, that the court below correctly decided that a foreign sovereign is not bound by a statute of limitations which does not bind the domestic sovereign.

5. *No state statute of limitations can impede the consummation of the Litvinov Assignment.* The assignment is an executive agreement made in an exercise of the complete and exclusive power of the national government over international affairs and cannot be subjected to any curtailment or interference by the several States. *United States* v. *Belmont,* 301 U. S. 324, 331. That executive agreement is a treaty, in the international sense, and it has been recognized from the beginning that the preservation of the good faith of the United States in dealing with foreign nations requires that all such treaties must be superior to all state laws and policies. *United States* v. *Belmont,* 301 U. S. 324, 331; cf. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 316, *et seq.*

In the present case, as in the *Belmont* case, it is sought to defeat the Government's claim and to dismiss the complaint on the ground that a local public policy, there the policy against confiscation and here the policy of the statute of limitations, was offended. The court below relied upon the *Belmont* case for its conclusion that the state statute of limitations cannot bar a foreign sovereign

and we submit that that decision clearly is correct under the *Belmont* case.[1]

CONCLUSION

The order below is interlocutory and is in accord with the applicable precedents. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
SAM E. WHITAKER,
Assistant Attorney General.

DECEMBER 1937.

[1] The petitioner states (p. 14) that "It is established on authority not heretofore disputed that the claim, if barred in the hands of the State of Russia, was barred in the hands of the United States as its assignee." The respondent did and does dispute that assertion. The Soviet Government, the respondent's assignor, has been the Government of Russia since November 7, 1917, and no repudiation of the debt to begin the period of limitations was communicated to that Government. Moreover, apart from any application of the local statute of limitations to the Soviet Government if it sued on the claim, the acceptance of the assignment by the United States, as part of the executive agreement made in the exercise of the power over foreign relations, and suit by the United States, prohibits operation of the statute of limitations now against the domestic sovereign. The United States, in asserting a claim of that character, is not in the same position as a private party who is assignee of a private right after it is barred by limitations. *United States* v. *Belmont*, 301 U. S. 324. Cf. *Administrator of Hungarian Property* v. *Finegold* (K. B. Div.), 144 Law Times Reports 670.

APPENDIX

Assignment by the Soviet Government to the United States Government

Washington, *November 16, 1933.*

My Dear Mr. President:

Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the

settlement referred to above, not to make any claims with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOFF,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics.

Mr. FRANKLIN D. ROOSEVELT,
President of the United States of America,
The White House.

U. S. GOVERNMENT PRINTING OFFICE: 1937